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No. 80-1540

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PARTIDO NUEVO PROGRESISTA, *Petitioner*,

v.

GERINELDO BARRETO PEREZ, Administrator, Puerto Rico Elections Commission,

and

PARTIDO POPULAR DEMOCRATICO, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I. SUMMARY STATEMENT OF THE PROCEEDINGS

The petition for a writ of certiorari requests that this Court review the decision of the First Circuit herein which reversed and set aside a decision of the United States District Court for Puerto Rico (Torruella, D.J.) entered in a case brought under 42 U.S.C. §1983. Judge Torruella granted relief to petitioner, directing that certain contested ballots in a local election should not be counted. In effect, he determined that the Supreme Court of Puerto Rico had wrongly construed the local election statutes and had wrongly

directed that the contested ballots should be counted in accordance with the conceded intent of the voters.

Neither the petitioner nor any other party to the Puerto Rican Supreme Court case sought review by this Court of the decision of the Puerto Rican Supreme Court.[1] Instead, petitioner sought to annul the decision of the Puerto Rican Supreme Court by this suit filed in the Federal District Court for Puerto Rico under 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

Respondent appealed the Federal District Court's decision to the First Circuit which, after expedited hearing, reversed. (Petitioner's App. p. 1a). It held that the United States District Court for Puerto Rico had "erred in its conclusion" that "federal court intervention in this case" was permissible. It held that the present case was "inappropriate for federal court review in a civil rights action"; that it did not involve a question of "patent and fundamental unfairness"; that "it does not involve a state court order that *dis*enfranchises voters; rather it involves a Commonwealth decision that *en*franchises them" (italics in original). (Pet. App. p. 5a). Petitioner filed with Justice Brennan an Application for Stay and Recall of the First Circuit's Mandate, pending petition for certiorari. (No. A-601). Justice Brennan referred the Application to the full Court. It was denied on January 26, 1981. Petitioner nevertheless proceeded to seek certiorari for the purpose of overturning the judgment of the Supreme Court of Puerto Rico and obtaining a judgment of this Court which would invalidate 700 to 1,000

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[1] Review by this Court on certiorari to the Supreme Court of Puerto Rico is provided by 28 U.S.C. §1258.

ballots out of the approximately 1,700,000 votes cast[2] because, according to petitioner, the Supreme Court of Puerto Rico erroneously held that the Puerto Rican statute, properly construed, required that the contested ballots should be counted in accordance with the manifest and undisputed intent of the voters.

The Supreme Court of Puerto Rico reached its result on the basis of the Constitution of Puerto Rico, which provides that "no person shall be deprived of the right to vote because he does not know how to read or write" (Art. VI, §4; see also Art. II., §2 and Art. II, §7); various regulations of the Puerto Rico Electoral Commission which are designed to validate "the intention of the elector over the type of mark"; the configuration of the ballot which invited the voter error;[3] and the novelty of the 1980 election procedures which, under a newly enacted law providing for an "open" instead of a "closed" system, deprived voters of the opportunity which they previously had enjoyed for instructions as to casting their ballots;[4] and the inability of some voters to read or write.

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[2] Most of the challenged ballots were cast in close elections for the lower House of the legislature and several municipalities. It cannot presently be predicted, however, whether the validation or invalidation of those ballots will determine the outcome of those elections because of the pendency of contests on other grounds, pending before the Supreme Court of Puerto Rico and unresolved at the time of this writing.

[3] The ballot included a blank space *above* the insignia and column of the respondent PDP which invited voters who could not or did not carefully read the instructions to place their mark in that blank space instead of *under* the insignia. See Ballots, Pet. App. pp. 79a-85a.

[4] Prior to the present election, a "closed" system was used in Puerto Rico. Voters were required to assemble in designated poll-

The Federal District Judge held that the Puerto Rico Supreme Court's decision had resulted in a denial of petitioner's rights. He enjoined the Administrator of the Puerto Rican Elections Commission from counting any of the contested ballots. His decision was reversed by the First Circuit (*supra*), and it is the First Circuit's decision that petitioner requests this Court to review.

II. THE "QUESTIONS PRESENTED"

The petition for certiorari states two "Questions Presented", neither of which is presented by the decision of the First Circuit, and neither of which is an issue in this case.[5] The first Question Presented is "Whether the Due Process Clause requires that electoral laws be administered so as to provide fundamentally fair elections for public office". No such issue is presented. The First Circuit did not hold that the due process clause is inapplicable. The First Circuit, correctly applying the established law to the facts of this case, held that the case was "inappropriate for federal court review in a civil rights action, lest the

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ing places (schoolrooms, etc.); the doors were closed at a designated time; representatives of all parties instructed the assembled voters, including answering questions, as to the proper form for marking and casting the ballot, and voting then took place. The "open college system", inaugurated by the 1977 election law, is like the system familiar in the States, and made no provision for voter questions and instruction prior to their marking and casting their ballots. Only if requested to do so, may the poll inspector explain the voting procedure, according to the 1977 Electoral Law. See 16 L.P.R.A. §3239 (Supp. 1979).

[5] This Court's Rule 21.1(a) states that "Only the questions set forth in the petition or fairly included therein will be considered by the Court".

federal courts 'be thrust into the details of virtually every election' ". Among other factors, it pointed out that the decision of the Puerto Rico Supreme Court enfranchised and did not "disenfranchise" voters and that it did not deprive petitioner of voting rights.

The District Court had relied on the First Circuit's 1978 decision in *Griffin* v. *Burns,* 570 F.2d 1065, which had invalidated, on due process grounds, the election of candidates in a primary election for local office in Rhode Island. In *Griffin* a number of voters had been disenfranchised because official statements induced them to cast absentee ballots instead of voting in person, although the statute did not permit absentee voting. In the present case, the First Circuit, reversing the District Court, pointed out that the facts were fundamentally different. It stated:

> "We hold that the district court erred in its conclusion that *Griffin* v. *Burns* permitted federal court intervention in this case. In *Griffin* we held that the election process had reached 'the point of patent and fundamental unfairness,' and ordered a new election. Voters there had been told for many years that they could vote in a primary by absentee ballot, and such ballots had been furnished them by election officials in the challenged election. After the election they were told that their absentee ballots were void. Unlike *Griffin,* this case does not involve a state court order that *dis*enfranchises voters; rather it involves a Commonwealth decision that *en*fanchises them—plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting. Moreover, in *Griffin,* had those casting absentee ballots known of their possible invalidity, many might have gone to the polls and voted in person. Here there was no such reliance

> upon an official interpretation of the local election law; no party or person is likely to have acted to their detriment by relying upon the invalidity of ballots with marks outside the ballots' drawn rectangles. For these reasons, we believe this case falls not within the purview of *Griffin* but within the area delineated by the Second Circuit, in *Powell* v. *Power,* 436 F.2d 84 (1970), as inappropriate for federal court review in a civil rights action, lest the federal court 'be thrust into the details of virtually every election. . . .' (*Id.* at 86)." (Pet. App. p. 5a).[6]

In its "Reasons for Granting the Writ", petitioner attempts to support this "Question Presented" by urging this Court to grant certiorari in the present case to "Overturn Its Decision In *Snowden* v. *Hughes,* 321 U.S. 1 (1944), Which Would Bar The Application Of The Due Process Clause To Ensure Fundamental Fairness In The Conduct Of Elections For Public Office. . . ." (Petition p. ii). This is, of course, a total misreading of *Snowden* v. *Hughes.*[7] *Snowden* held that the mere failure, even if erroneous or unlawful, of state officials to certify a candidate under state law, for purposes of a party primary election, does not, standing alone, give rise to a cause of action under §1983 or the due process clause. Snowden's claim was rejected because "There is no contention that the statutes of the state are in any respect inconsistent with the guaranties of the Fourteenth Amendment"; and no allega-

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[6] Circuit Judge Campbell, who was the Presiding Circuit Judge in the present case, wrote the opinion of the court in *Griffin* v. *Burns.*

[7] Similarly, at page 6, petitioner misreads *Snowden,* stating that it holds "that candidates for state office enjoy no protection under the Due Process Clause".

tion of an intentional or purposeful discrimination between persons or classes (321 U.S. at 7-8, 64 S.Ct. 397 at 400-401). The Court held that "an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not *without more* a denial of the equal protection of the laws" (*ibid.*). (Emphasis supplied).[8]

Petitioner's plea, although cast in the inappropriate guise of an attack upon *Snowden* v. *Hughes,* invites this Court to overrule the settled constitutional doctrine which restricts federal intervention in the electoral process to situations of "invidious, purposeful discrimination" or which are "endemic to the system", and excludes "the ordinary dispute over the counting and marking of ballots" (see *infra*). We submit that the Court should decline the invitation; and in any event, the present case, which involves the *validation* of voter intent, would be singularly inappropriate for

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[8] Petitioner quotes the passage in *Snowden* to the effect that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause" (Pet. p. 9). Neither this nor similar quotes elsewhere in the relevant cases supports petitioner's contention. The federal constitutional protection is an independent right, proceeding from federal standards. It is not a provision for supervising state procedures, prescriptions or decisions unless they are of a character and nature which violate federal rights.–The electoral process for state office is committed by our system to *state* administration. Only where it violates the special, fundamental federal guarantees is it subject to federal discipline. This is the doctrine of *Snowden* v. *Hughes,* which is reiterated in the body of case law in all circuits which have considered the matter. It is the principle which, as the First Circuit correctly decided, controls the present case and required dismissal of petitioner's federal complaint.

the purpose, as the First Circuit's opinion demonstrates.

The holding of *Snowden* v. *Hughes* and the distinction it draws between "intentional and purposeful discrimination" in state electoral processes and mere unlawful administration of state election laws, have been consistently followed in a large number of cases.[9] Like *Snowden,* decided cases in all circuits recognize the fundamental role of the Fourteenth Amendment in election cases, subject to the infinite variety of factual situations.[10]

The basic principle is well established in the First Circuit and was correctly applied in this case. It based its decision herein on the principles which it had summarized in *Griffin* v. *Burns,* 570 F.2d 1065, 1077 (1978)

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[9] See, *e.g., Powell* v. *Power,* 436 F.2d 84 (2d Cir. 1970); *Saxon* v. *Fielding,* 614 F.2d 78 (5th Cir. 1980); *Gamza* v. *Aguirre,* 619 F.2d 449 (5th Cir. 1980); *Hennings* v. *Grafton,* 523 F.2d 861 (7th Cir. 1975); and *Pettengill* v. *Putnam County R-1 School District, Unionville, Missouri,* 472 F.2d 121 (8th Cir. 1973).

Petitioner states that the lower federal courts "have not adequately resolved" the definition of "the due process right to a fundamentally fair election". Petitioner does not and could not assert that there is a conflict among the circuits which might invite review in an appropriate case (Pet. pp. 10-13; see "Questions Presented", and "Reasons for Granting the Writ" (Pet. i, ii).

[10] *Cf., Bullock* v. *Carter,* 405 U.S. 134, 92 S.Ct. 849 (1972). In that case, this Court sustained an action by candidates for local office in Texas, and held that a Texas statute requiring payment of fees ranging as high as $8,900 as a prerequisite for candidacy was arbitrary and unconstitutional. This requirement, resulting in unjustifiably excluding from the primaries persons unable to make the large payment, the Court held, is "endemic to the system" (405 U.S. at 144, 92 S.Ct. at 856) and "results in a denial of equal protection of the laws" (405 U.S. at 149, 92 S.Ct. at 859).

that "[t]he right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefor in order. *Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots;* and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action". (Emphasis supplied).

The second "Question Presented" by petitioner is "Whether a post-election change in Puerto Rican electoral laws that retroactively alters the outcome of the election violates the Due Process Clause". This question is *not presented* by the present case. It is significant that it is stated but not discussed in the petition.[11] There was no "post-election change in Puerto Rican electoral laws"; there was a decision, pursuant to the relevant local statutes, by the Supreme Court of Puerto Rico on petitions challenging the action of the electoral authorities who, by divided vote, invalidated certain ballots. Presumably, petitioner is suggesting that because the decision of the Puerto Rico Supreme Court came after the election,

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[11] The *only* reference in the body of the petition is the following sentence (p. 15):

> "Candidates seek public office and citizens vote in elections with the central although unexpressed expectation that elections will be administered fairly—for example, that the electoral rules will not be reinterpreted or modified after a close election in a way that may be foreseen to change the outcome of the election."

it was "retroactive", unconstitutional and a violation of the rights of petitioner.–This is obviously untenable; judicial decisions construing election statutes and regulations determining the validity of ballots are necessarily rendered after the ballots are cast. Petitioner's contention would castigate all such decisions as "retroactive" and, therefore, an unconstitutional deprivation of the rights of the losing party.

To place the matter in perspective, it should also be noted that the decision of the Supreme Court of Puerto Rico, interpreting the statute so as to validate the manifest intention of the voters, was made in a case of first impression. The statutory provision in issue first appeared in the new Electoral Law of 1977. This was the first election held pursuant to its terms. The construction of the 1977 statute involved had never been considered by the Commonwealth Supreme Court nor by any other court prior to the present decision. The issue of the validity of the disputed ballots arose for the first time shortly after the November 4, 1980 general elections, during the recount conducted by the Election Commission. Its resolution turned on the construction which should be given to Article 1.033(b) of the 1977 Electoral Law, 16 L.P.R.A. §3033(b),[12] in the light of the entire statute, various of the Election Commission's regulations designed to validate "the intention of the elector over the type of mark", and the constitutional provisions guaranteeing equal protection and particularly the provision of the Constitution of Puerto Rico stating that "no person shall be deprived of the right to vote because he does not know how to read or write . . . ." Art. VI, § 4.

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[12] This provision required that the voter's mark must be placed *under* the printed insignia or device of the party.

The election officials ruled the ballots invalid. On petitions for review filed by the Puerto Rico Socialist Party and by respondent PPD, the issue as to the proper construction of Article 1.033(b) came before the Supreme Court of Puerto Rico. The issue was one of first impression. It had never been considered or decided by any court prior to the court's decision here involved, on December 2, 1980.

Most of the disputed ballots here in issue were marked by voters intending to vote for the candidates of respondent PPD, who placed marks *above* the insignia of that party instead of below it. As the Court of Appeals states, this occurred because the ballot was so constructed that the PPD was the only major party with a blank space above its ballot heading. A similar situation existed with respect to the minor Socialist Party, and the decision of the Supreme Court of Puerto Rico validating such ballots applied equally to that party's candidates and to mismarked ballots of all other parties whenever the intent of the voter is clear.

III. THE FIRST CIRCUIT'S DECISION IS CORRECT

The present case is nothing more than an attempt to persuade the federal judiciary to override the Supreme Court of Puerto Rico's interpretation of local law which gives effect to the undisputed intent of the voters and validates the ballots cast by many citizens in the 1980 general elections. In essence, the contention of petitioner PNP is that it is a violation of due process to construe and apply local law so as to give effect to the clear intent of the voters. It is true that every candidate is injured by laws which insist upon

counting the votes of those who vote for his adversary; but such "injury" is not a violation of any constitutional right.

The Civil Rights Act is not a statute for general collateral review by the federal courts of the correctness of state or Commonwealth judicial interpretations of local election laws. It is available only in certain limited circumstances when local governments have deprived citizens of the right of suffrage by acts of patent and fundamental unfairness. If this standard were enlarged as petitioners seek, federal courts would "be thrust into the details of virtually every election . . . ." See *Powell* v. *Power,* 436 F.2d 84, 86 (2d Cir. 1970).

The decision below correctly concludes that in the situation herein there is no basis for federal court intervention. Petitioner's claim is that the Supreme Court of Puerto Rico incorrectly decided that certain ballots were valid on the basis of its construction of local law. The Supreme Court of Puerto Rico's decision "enfranchises" voters by protecting and validating their undisputed intent; its interpretation of the local election law did not prevent anyone from voting; there was and could be no "reliance" by any party or person upon the literal terms of the election law which, if literally applied, raised serious constitutional questions by rendering invalid ballots for a minor, mechanical flaw, regardless of the manifest intent of voters and contrary to other regulations enjoining election officials to implement the manifest intent of the voters. Certainly, the decision does not violate the

standards of fundamental fairness of the due process clause.[13]

As the decision below indicates, the standards applied by the First Circuit to the situation at hand are those which it articulated in *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), in which, under altogether different facts, it invalidated the results of a local election. There, after stating that all qualified voters have a constitutionally protected right to vote in local elections, the First Circuit stated the following due process standard: "If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action". (570 F.2d at 1077). The court pointed out, however, referring with approval to *Powell* v. *Power*, 436 F.2d 84 (2d Cir. 1970) and to *Pettengill* v. *Putnam County R-1 School District, Unionville, Missouri*, 472 F.2d 121 (8th Cir. 1973), that federal courts are not empowered to supervise and control local elections with respect to "garden variety irregularities", contests over the counting, marking and validation of ballots, and other errors and misconduct in the administration of local elections. Due process, the First Cir-

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[13] A translation of the opinion of the Supreme Court of Puerto Rico appears as Appendix H to the petition.

cuit held, is implicated only "where the entire election process—including as part thereof the state's administrative and judicial corrective process—fails on its face to afford fundamental fairness". (570 F.2d at 1078).

Applying those standards to the situation in this case, the First Circuit correctly held that the present case did not present a case for which relief under §1983 of the Civil Rights Act was appropriate. Its decision is clearly correct.

IV. PETITIONER LACKS STANDING, AND IT IS BARRED FROM COLLATERAL ATTACK ON THE JUDGMENT OF THE PUERTO RICO SUPREME COURT AND BY RES JUDICATA

Counsel for respondent consider it their duty to call this Court's attention to two fundamental bars to petitioner's suit. The first relates to petitioner's standing to maintain this action under § 1983. Petitioner is a political party in Puerto Rico which, until the last election, controlled the governorship and both houses of the legislature as well as most municipalities. In the last election, the Governor was reelected, but petitioner lost control of the Senate and most municipalities. Control of the lower House of the legislature and of a few municipalities, in this extraordinarily close election, is in doubt at the time of this writing, pending resolution by the Supreme Court of Puerto Rico of challenges to ballots on various grounds.

As filed, several individuals who were not electors in the affected districts, joined with petitioner in the complaint in the Federal District Court, That court, however, dismissed as to the individual plaintiffs for lack of a justiciable controversy as to them (District

Court Opinion, Pet. App. B, pp. 16a-20a). No appeal was taken by the individuals and their claim was not before the First Circuit (Opinion, Pet. App. A, p. 2a, footnote 1).[14]

Respondent's counsel failed to challenge the standing of petitioner and this question was not considered below. Since the standing of petitioner is jurisdictional, however, it may be considered by this Court. See *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 281 n. 14, 98 S.Ct. 2733, 2743 (1978); and *Juidice* v. *Vail,* 430 U.S. 327, 331, 97 S.Ct. 1211, 1215 (1977). The issue of course, is whether petitioner, a political party, has standing under §1983 to assert that the improper or "unlawful" counting of the contested ballots would deprive *petitioner* of constitutionally guaranteed rights. See *Singleton* v. *Wulff,* 428 U.S. 106, 96 S.Ct. 2868 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 498-501, 95 S.Ct. 2197, 2205-2206 (1975), and *Duke Power Co.* v. *Carolina Environ. Study Group,* 438 U.S. 59, 71-81, 98 S.Ct. 2620, 2629-2634 (1978). Petitioner, being neither a candidate nor an affected voter, has no standing to assert deprivation of rights under §1983.

Another fundamental bar to petitioner's suit follows from the fact that its federal claim is, in substance and reality, a contention that the Supreme Court of Puerto Rico erred in its construction of the Puerto Rican statute; as we have shown, it is not a claim of federal right, flowing from §1983 and the Fourteenth

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[14] After the First Circuit's decision in the present case, the individuals, on January 22, 1981, filed their appeal from the District Court's order of dismissal. The record on appeal has not yet been submitted.

Amendment. So considered, petitioner's claim is barred by *res judicata* and, in any event, cannot be asserted by collateral attack.[15] Petitioner was a party, by intervention, to the action before the Puerto Rico Supreme Court. That judgment is final and petitioner is concluded by it. Further, petitioner could have sought review of the Puerto Rico Supreme Court's decision by certiorari from this Court. (28 U.S.C. §1258). It did not do so. Instead, it sought to nullify the Commonwealth judgment by collateral attack in the guise of a §1983 action. Exclusive jurisdiction to review judgments of the Supreme Court of Puerto Rico rests with this Court under 28 U.S.C. §1258. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923); Currie, *Res Judicata: The Neglected Defense,* 45 Univ. of Chi. L. Rev. 317, 321-325 (1978); and Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts,* 31 Hastings L.J. 1337 (1980).

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[15] The First Circuit recognized that petitioner "is arguably barred" by *res judicata* from litigating its claim, but it did not rule on the point, stating that "Without expressly deciding this issue, we have determined to proceed to the merits as we find it clear that, in any case, appellees PNP cannot prevail". (Pet. App. p. 3a, footnote 2).

V. CONCLUSION

For the reasons stated, respondent submits that this cause should not be reviewed by this Court and that the petition should be denied.

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